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CONTEMPT OF COURT.

(*Continued from March No., ante, p.* 159.)

III. OF THE POWER OF COURTS AT COMMON LAW TO PUNISH CONTEMPTS.

1. *What courts possess this power.*

ALL courts have power to punish by fine and imprisonment contempts committed in their presence: *Rex* v. *Almon*, Wilmot's Notes 243. The power is inherent in all courts: *In re Cooper*, 32 Vt. 253; *State* v. *Woodfin*, 5 Ired. 199; 4 Stephens's Com. 342. A court is a place wherein justice is judicially administered: 3 Blk. 23. It signifies also in legal parlance the judges or magistrates who therein administer justice, while so acting, and includes many magistrates and others acting in judicial capacities not usually so designated, such as the mayor of a city, justices of the peace while in execution of their office, the sheriff, when holding his court, the sheriff's tourn: 2 Hawk. P. C. 93, § 15; *Regina* v. *Lefroy*, 8 Q. B. 134; 4 Moak 250; *Sparks* v. *Martyn*, Ventris 1. While this is true of all courts, "whether of record or not," (*Rex* v. *Almon*, *supra*), it is especially so as to the courts of Westminster Hall and the superior courts in this country, which moreover possess in addition the power of issuing attachments for contempts, whether direct or constructive, not in *facie curiae*. This distinction between the powers of superior and inferior courts will be dwelt on more at large hereafter in the discussion as to the nature and extent of this power: 4 Blk. 283; *Rex* v. *Almon*, Wilmot's Notes 243 (1765); *Resp.* v. *Oswald*, 1 Dall. 319; *Mid*

dlebrook v. *State*, 43 Conn. 257 (1876); *Cartright's Case*, 114 Mass. 230, citing Clark's Praxis 62 (67); Acta Canc. 209, 264, &c.

The power to punish contempt in a summary manner is incident to courts of law and equity. See the cases in United States Dig., *Contempt*, pl. 6.

The courts of the United States have power to punish for contempt, not immediately derived from statute, but necessarily resulting from the nature of their institution: *United States* v. *Hudson, et al.*, 7 Cr. 32, 34 (1812). This power exists under the constitution, not being taken away by the provisions respecting trial by jury: *Hollingsworth* v. *Duane*, Wall. 77, 106.

The Judiciary Act of 1789, sect. 17, gave to the courts of the United States power "to punish by fine and imprisonment, at the discretion of the court, all contempts of their authority." But the Act of 2d March 1831 restricted this power. See Rev. Stat. U. S., sect. 725; 1 Kent 330, note b. But a single London commissioner of bankruptcy, sitting alone, has not power to punish for contempt under the act creating such commissioners, such contempts being cognisable by the courts of review established by the same act: *Rex* v. *Faulkner*, 2 Mon. & Ayr. Cases in Bankruptcy 332, 339.

In a note in 1 Kent (330 n. b) it is said, speaking of this case, "that the power of the courts to punish summarily for contempts has lately been much restrained in England."

Nor, it would seem, has a judge sitting at chambers this power till his order be made a rule of court; he has not in such capacity the power of a court of record: Id. To the same effect, *People* v. *Brennan*, 45 Barb. 344. *Contra*, if there be an action pending in the court in which the order, disobedience of which constituted the contempt, was issued. And see *Hilton* v. *Patterson*, 10 Abb. Pr. 245.

It has been held that this power does not arise from the mere exercise of judicial functions, and that the recorder of the city of Hoboken had not such power, even in case of contempt, in *facie curiæ*: *Matter of Kerrigan*, 33 N. J. L. (4 Vroom) 344.

It seems that Congress cannot delegate to a commissioner, or any other than a judicial officer, the power of summary committal for contempt. "This was an exercise of the judicial power of the United States, which under the constitution could not be intrusted to an officer appointed and holding his office," as these commissioners do: CADWALADER, J., in *Ex parte Doll*, 7 Phila. 595.

In Pennsylvania, commissioners, under rule of court, &c., to take testimony, have by statute power to issue attachments for defaulting witnesses: Purd. Dig. 622, pl. 2, 3.

This power also belongs to the Houses of Parliament, the Senate and House of Representatives of the United States.

The power to punish extends to imprisonment for a period not longer than the time of periodical adjournment or dissolution of such bodies: *Reg.* v. *Paty*, 2 Ld. Raym. 1105; *Ex parte Nugent*, Am. L. J. (N. S.) 107; *Crosby's Case*, 3 Wilson 204.

Under English law, this power of the Houses of Parliament seems to be exercised in a twofold capacity, as legislative bodies by prescription, as judicial bodies in their own right. See *Ex parte Brown*, 117 E. C. L. R. 280 (1864), where the Court of Queen's Bench held that the House of Kegs, the legislative body of the Isle of Man, as such had neither inherently nor by statute the power of committing for contempt: Id., pp. 289, 293. In *Doyle* v. *Falconer*, Law Rep., 1 P. C. 328 (1866), it was declared that the Legislative Assembly of Dominica does not possess the power of punishing a contempt, though committed in its presence by one of its members. Such authority has not been expressly granted, and does not belong to a colonial House of Assembly by analogy to the *lex et consuetudo Parliamenti*, which is a law peculiar to and inherent in the two Houses of Parliament in the United Kingdom. Nor is there any resemblance between a court of justice, which is a court of record, and a colonial House of Assembly, which is a body having no judicial functions, and can lay no claim to the inherent power of punishing contempt possessed by courts of justice. The Privy Council declared that the cases cited established conclusively that "the legislative assemblies in the British colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed beyond their walls;" and further, that "the power to punish and commit for contempt committed in its presence," is not necessary to the existence of such a body as the Assembly of Dominica, and the proper exercise of the functions which it is intended to execute. The council distinguished between the judicial power to punish for contempt, and the power necessary to self-preservation of removing obstructions to the action of a legislative body when sitting.

The opinion of the Supreme Court of the United States in *Anderson* v. *Dunn*, 6 Wheaton 204, was mentioned as sustaining

an opposite view, with which a previous decision in the Privy Council, since overruled, was in accord: viz., that the power of punishing contempts, whether direct or indirect, is inherent in every supreme legislative body. There was, however, no doubt as to the case under consideration, that "the warrants having been issued by virtue of an alleged authority, which if it existed was confessedly a limited one, ought to have shown on the face of them that the alleged contempt was committed in the presence of the House, and so fell within the limits of that authority."

This was an action for false imprisonment, and the action of the Speaker of the House and the members, was held not justified. The contempt was a very gross one, committed in the presence of the House.

2. *The origin of the power.*

For any clearly ascertained and definite source of this power in the common law, or in any decision or enactment giving rise to it, though it has been mentioned in modern times in various acts of Parliament (see 13 Car. II., c. 2, s. 2; 11 Geo. IV. & 1 Wm. IV., c. 36; 2 & 3 Wm. IV., c. 50; 23 & 24 Vict., c. 149; 40 & 41 Id., c. 21, sects. 40, 41, &c.) we may look in vain. Nor can we ascertain when it first arose; we find it actually exercised as early as the annals of our law extend: 4 Blk. 286. "It is as ancient as any other part of the common law:" WILMOT, J., in *Rex* v. *Almon*, Wilmot's Notes 243, 254; s. c. 5 Burr. 2686; *Resp.* v. *Oswald*, 1 Dall. 326. See also, 13 Car. II., c. 2, s. 2.

The power to protect themselves from insult, to enforce their authority, to repress disorder, and in such cases to punish offenders, is a necessary attribute of every court. "Without this power no court could possibly exist:" MCKEAN, C. J., in *Resp.* v. *Oswald*, 1 Dall. 329 (1788). It is a power necessarily implied from the nature of a court of justice, as being "necessary to the exercise of all others:" *United States* v. *Hudson et al.*, 7 Cr. 32–4; *United States* v. *New Bedford Bridge*, 1 Wood. & M. 401.

As regards the courts of Westminster Hall, their power in this respect is "coeval with their first foundation and institution:" WILMOT, J., *supra*. Although it is suggested in Gilb. Hist. C. P., ch. 3 (cited as authority for this opinion in Vin. Abr., *Contempt*, B 2) that this process may be derived from the Statute of Westminster II., 13 Edw. I., c. 39, he seems to conclude "that it is a part of the laws of the land, and confirmed by Magna Charta,

which is decidedly the opinion of both Blackstone and Judge WILMOT, *supra*. See, also, Bac. Abr., *Attachment*, 462; Salk. 84; Str. 185, 564. It is a part of the "laws of the land," within the meaning of art. 12 of the Declaration of Rights, in Massachusetts. See *Cartwright's Case*, 114 Mass. 23; see, also, *Middlebrook* v. *State*, 43 Conn. 267. It has been held, that this power is "independent of the common law or statutory provisions in regard to contempt," so far as respects the control of the court over its attorneys: *Ex parte Biggs*, 64 N. C. 202.

3. *The nature and extent of the power to punish for contempt, at common law.*

As before stated, all courts, from the inherent necessities of the case, possess this power in some degree; but to what degree, whether a limited or the fullest, and how possessed, whether independently of all other authority or subject to revision and control, we have now to consider.

In discussing what courts possess this power mention was made of the distinction between superior and inferior courts; under the present head this distinction is still more important, as furnishing a governing principle of discrimination which, with some exceptions, is generally applicable.

As regards the nature and extent of their powers, all courts are divided into:

(1.) Superior courts, which possess full power to punish contempts of all kinds, and whose proceedings are not subject to the supervision and control of any other courts.

(2.) Inferior courts, whose power to punish contempts is limited, and whose proceedings are subject to the supervision and control of the higher courts.

(1.) Superior courts are, in England, the Courts of Westminster Hall, especially the Court of King's Bench, also the Courts of Common Pleas, Exchequer and Chancery, the Assize Courts, held by judges of the Courts of Westminster Hall, who, in this capacity, "represent the next ancient and honorable of all the judges, the justices itinerant, or justices in eire" (WILLES, J., in *Ex parte Fernandez*, 100 E. C. L. R. 40), Courts of Nisi Prius, General Gaol Delivery, Oyer and Terminer, and of the Counties Palatine, the Royal Court of Jersey. Certain of the Ecclesiastical Courts seem to have occupied an uncertain position: *Ricketts* v. *Boden-*

ham, 31 E. C. L. R. 107; they were not courts of record: 3 Blk. 67; Com. Dig., *Courts*, N 1.

In the United States this class includes all the federal courts, all supreme courts, courts of appeal, courts of last resort, whether at law or in equity, courts of equity or chancery, courts of common pleas, all which are courts of general jurisdiction, may be denominated "supreme courts of justice" (4 Blk. 286), are courts of record, and in England, the king's courts: 3 Blk. 24, 29, 59; 4 Id. 270, 271, n. 11; Hall's Am. Crim. Law 35, 36; *Ex parte Fernandez, supra*; *Carus Wilson's Case*, 53 E. C. L. R. 983; *Turner* v. *Bank*, 4 Dall. 11; *Ex parte Watkins*, 3 Pet. 205; *Williamson's Case*, 26 Penn. St. 23, 26; *McLaughlin's Case*, 5 W. & S. 273.

Yet a superior court is not of necessity a court of record, at least in England, although it seems to be considered the criterion in 2 Hawk. P. C. 168; there are several of the king's courts not of record, as the Court of Equity in Chancery, the Admiralty Courts, &c.: 3 Blk. 24, n. 2; Vent. 1. "As the statute of the 27 Hen. VIII. says, there is as much difference between the king's ministry of justice in his superior courts and his inferior courts, as between being governed by the king in person and by his deputy:" *Cross* v. *Smith*, 1 Salk. 148.

In the United States, there are some courts, which, though of special and limited jurisdiction, still belong, in fact, to this class of courts. Though sometimes designated in the constitution or statutes creating them as inferior courts, they are so only relatively and not in the common-law sense of the term. Such are the United States Circuit and District Courts: *Ex parte Watkins*, 3 Pet. 205; 4 Wash. C. C. 211; whose judgments, although erroneous, if the jurisdiction do not appear on the face of their proceedings, and for that reason reversible on writ of error or appeal, are till then only voidable not void, and are not to be questioned in a collateral proceeding; *McCormick* v. *Sullivant*, 10 Wheat. 192; *Wood* v. *Mann*, 1 Sumn. 580; *Thompson* v. *Lyle*, 3 W. & S. 166; *Chemung Bank* v. *Judson*, 4 Seld. 254. See, also, *Beaubien* v. *Brinckerhoff*, 2 Scammon 269; *Meyer* v. *Kalkman*, 6 Cal. 582. To determine their rank, reference must, of course, be had to the terms of the instrument by which they are created. They are not necessarily of an inferior order: *McKenzie* v. *Ramsay*, 1 Bailey (So. C.) 457; *Turner* v. *Bank*, 4 Dall. 11.

(2.) Inferior courts, or more properly, courts of an "inferior order" (*In re Fernandez, supra* 40) are usually not of record. Some are (or rather were) private, some are public courts. An instance of a private court was the copyholder's court. In this class of courts are reckoned the ancient court of *pie poudre* or market court, which, however, *was* a court of record, the hundred court, the county court, held by the sheriff (these two last were not of record, yet the sheriff's tourn was); the coroner's court, the court of quarter sessions, the court leet, all courts of record. These are courts of "partial jurisdiction," and certain of them are now, and have long been, obsolete: 3 Blk. 37, 35 n. 3; 4 Id. 274. With these may also be classed certain local courts, such as mayor's courts, borough courts, &c., not necessary to be enumerated: 3 Blk. 24, 25, 32–5, 37; 4 Id. 273, 274; Strange 392, 449, 567, 794; Salk. 200–3, 650; Com. Dig., *Courts*, P; Bacon's Abr., *Courts*, D; *Justice of Peace*, E.

All courts of common law that have power to fine and imprison are courts of record: 2 Hawk. c. 1, sect. 14. So all jurisdictions erected with this power: Salk. 200. A justice of the peace is a judge of record: Bac. Abr., *Justice of Peace*, E.

Among inferior courts now abolished (see statute 12 & 13 Vict., c. 101, sect. 13) were those of the Marshalsea, of the palace, and her Majesty's "court of record for the honor of Peveril."

This designation will embrace many statutory courts which have only the powers bestowed on them by the statutes creating them, such as the new county courts in England: 4 Stephens's Com. 342 n. g; stat. 9 & 10 Vict., c. 95, s. 113; 1 Chitty's Statutes 1208.

Others are constituted by statute with the powers and privileges of superior courts, as the Court of Review in Bankruptcy: *Regina* v. *Lefroy*, L. R., 8 Q. B. 134; 4 Moak 250; *Van Sandau* v. *Turner*, 6 Ad. & E. (N. S.) 784; *Meyer* v. *Kalkman*, 6 Cal. 582.

In connection with this point are worth noting Chief Justice MARSHALL'S remarks in *Ex parte Bollman*, 4 Cr. 93, cited in *United States* v. *New Bedford Bridge*, 1 W. & M. 436: "Courts which originate in the common law possess a jurisdiction which must be regulated by the common law until some statute may change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction."

Inferior Courts in the United States.

In the United States the term "inferior court" is seldom employed in the English sense of the term, as designating a court of an "inferior order;" it usually means only a subordinate court, (*McLaughlin* v. *District Court*, 5 W. & S. 273), from which an appeal lies, and which is therefore relatively inferior. This difference must be borne in mind in construing the American decisions.

"Inferior courts," "in the technical sense of those words," are defined by Chief Justice MARSHALL, in *Ex parte Watkins*, 3 Pet. 205, as "courts of special and limited jurisdiction, which are erected on such principles that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction." Their judgments may be questioned collaterally, and do not stand on the same ground with those of a court of record. But they are not necessarily inferior because of special and limited jurisdiction, as has been shown *supra*.

The decisive test in the United States, which distinguishes superior and inferior courts in the common-law sense of the terms, is that the former are courts of record while the latter are not: *Ex parte Watkins*, *supra* 209; *Den, &c.*, v. *Turner*, 9 Wheat. 541; *In re Cooper*, 32 Vt. 253; *Van Valkenburg* v. *Evertson*, 13 Wend. 76; *Beaubien* v. *Brinckerhoff*, 2 Scam. 272; *Meyer* v. *Kalkman*, 6 Cal. 582; *Nugent* v. *State*, 18 Ala. 521; *Thompson* v. *Lyle*, 3 W. & S. 166. Courts of justices of the peace and other similar magistrates are usually of this class.

The courts of general sessions of the peace, held by all the justices in a county, belonged to this category in New York, before the adoption of the present code, and so the county Courts of Common Pleas of that state at the same period, which were declared to be not like the English Courts of Common Pleas: *People* v. *Justices of Delaware County*, 1 Johns. Cas. 181 (1799), in which the characteristics of an inferior court are well set forth: *People* v. *Sessions of Chenango*, 2 Caines's Cas. 319 (1805); *Richmond* v. *Dayton*, 10 Johns. 393; *Van Valkenburgh* v. *Evertson*, 13 Wend. 76. And as to New Jersey, see *State* v. *Hunt*, Coxe 287 (1795); *Kerrigan's Case*, 33 N. J. 344 (1869).

In Pennsylvania a justice's court is an inferior court and not of record. He has no common-law powers, and cannot punish contempts, even committed before him, by summary proceeding: *Burginhofen* v. *Martin*, 3 Yeates 479; *Albright* v. *Lapp* 26 Penn. St. 99.

And in Kansas it is an inferior court, and not of record: *Wooster* v. *McKinley*, 1 Kansas 317. In Illinois it is "a court of an inferior jurisdiction," with power to punish only contempts *in facie curiae: Clark* v. *People*, Breese 266.

Its status seems much the same in Massachusetts: *Albee* v. *Ward*, 8 Mass. 86; *Smith* v. *Morrison*, 22 Pick. 430; in South Carolina, *State* v. *Applegate*, 2 McCord 110; *Harney* v. *Huggins*, 2 Bailey 267; in Georgia, *Planters' Bank* v. *Chipley*, Ga. Dec. 50; in Alabama, *Ellis* v. *White*, 25 Ala. 540; in Mississippi, *Stockett* v. *Nicholson*, 1 Miss. (Walk.) 75.

Though an inferior court and not of record, in Illinois, he can fine for contempt and imprison for non-payment of the fine: *Brown* v. *People*, 19 Ill. 613; *Bowers* v. *Green*, 1 Scam. 42; *Tindall* v. *Meeker*, Id. 137; *Robinson* v. *Harlan*, Id. 237; *Trader* v. *McKee*, Id. 558 and note.

In New Hampshire, though an inferior court and not of record having only statutory jurisdiction, his judgment will not be treated, in a collateral proceeding or on habeas corpus, as a nullity, Nor the merits of the question he decided be re-examined, as long as he has not overstepped his jurisdiction: *Burnham* v. *Stevens*, 33 N. H. 256, 258; *State* v. *Towle*, 42 N. H. 540.

But they are courts of record and hold a higher rank, in Vermont: *In re Cooper*, 32 Verm. 253; Ohio, *Adair* v. *Rogers*, Wright 428; Indiana, *Hooker* v. *State*, 7 Blackf. 272.

In Texas, the question whether they are or are not courts of record, is undetermined: *Wahrenberger* v. *Horan*, 18 Tex. 57.

Recent enactments in some of the above states may have altered the law but the point does not seem to require further examination here.

A probate court is an inferior court in Massachusetts: *Smith* v. *Rice*, 11 Mass. 507; *Chase* v. *Hathaway*, 14 Id. 222. And so it seems the county courts, formerly held by justices of the peace, in Virginia; *Stokeley* v. *Commonwealth*, 1 Va. Cas. 330 (1812).

The Surrogate's Court in New York is not a court of record: *Matter of Watson*, 3 Lans. 408.

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(*To be continued.*)